United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1219

UNITED STATES OF AMERICA,

Appellee,

—v.—

ARIEL POMARES and ANTONIO VECIANA,

Defendants-Appellants.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Ariel Pomares and Antonio Veciana appeal from judgments of conviction entered on March 13, 1974, in the United States District Court for the Southern District of New York, after a five day trial before the Honorable Dudley B. Bonsal, United States District Judge, and a jury.

Indictment 74 Cr. 7 filed January 4, 1974, charged Ariel Pomares and Antonio Veciana in Count One with conspiracy to distribute narcotics drugs and possess them with intent to distribute, and in Count Two with distributing and possessing with intent to distribute approximately seven kilograms of cocaine, in violation of Title 21, United States Code, Sections 812, 841(a)(1), 841(b)(1)(A) and 846.*

* Indictment 74 Cr. 7 superseded Indictment 73 Cr. 793 filed on August 10, 1973. The indictments were essentially identical

[Footnote continued on following page]

The trial commenced on January 8, 1974 and concluded on January 14, 1974, when the jury found both defendants guilty on both counts.

On March 13, 1974, the defendants were sentenced. Antonio Veciana received concurrent terms of imprisonment of seven years on each count, to be followed by a special parole term of three years. Ariel Pomares received concurrent terms of imprisonment of five years on each count, also to be followed by a special parole term of three years.

Veciana posted $100,000 cash bail after sentencing and is at liberty pending his appeal. Pomares is presently serving his sentence.

Statement of Facts

A. The Government's Case

The government's evidence at trial described how Antonio Veciana, Ariel Pomares and Agustin Barres, three Cuban businessmen, refugees to the United States living in Miami, Florida and Puerto Rico, organized a cocaine smuggling ring and smuggled twenty-five kilograms of pure cocaine into the United States from Bolivia before Barres was arrested while delivering seven kilograms of cocaine to an undercover narcotics agent in a Manhattan hotel on July 23, 1973. The evidence set out the different role of each man in the operation. Veciana travelled to Bolivia, purchased the cocaine and delivered it to Bolivian diplomats

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except that certain overt acts were added to the superseding indictment which had earlier been alleged in the Bill of Particulars for the first indictment, and Veciana was named a co-defendant with Pomares in Count Two.

Agustin Barres was named in Count One as a co-conspirator. He pleaded guilty prior to trial to an information charging him with the same conspiracy charged against Veciana and Pomares.

who smuggled it into the United States. Barres helped finance the purchase of the cocaine, with Pomares received the cocaine in Florida from Veciana and for the last shipment attempted to sell the cocaine in New York. Pomares successfully sold the first two shipments to buyers with whom he had contacts in Florida.

Agustin Barres was the chief government witness at the trial. His testimony was corroborated by numerous documents introduced by the government, by a complete confession given by Pomares to Federal narcotics agents after his arrest at a time when he said he wanted to cooperate with the government, and by the testimony of four other individuals who provided confirmation of certain details of Barres testimony.

1. Background and the First Shipment of Five Kilograms of Cocaine

Agustin Barres left Cuba in 1961. He had originally supported the overthrow of Battista but when Castro moved toward communism, Barres escaped and settled in Puerto Rico. There he started a number of businesses and became a successful and wealthy real estate speculator in Florida and Puerto Rico and President of Freca Importers, an auto supply business. In 1967, Ariel Pomares, came to work for Barres at Freca Importers and by 1971 Pomares had risen to be Treasurer of Freca and right hand man to Barres. Antonio Veciana, and Barres became friends in 1970 through the anti-Castro, free-Cuba, movement in the United States in which both were active.

In the spring of 1972, Veciana and Barres suffered a number of business setbacks. Both invested in a tour of the Cincinnati Reds and Pittsburgh Pirates professional baseball teams to Venezuela which was a financial failure and both lost money when a promising boxer in whom they had invested was knocked out in the first round by the

light-heavyweight champion. Barres was also short of cash to pay off his business loans because his real estate interests could not be liquidated (Tr. 55-73).*

In late 1971 Veciana had discussed with Barres the easy availability of cocaine in Bolivia where Veciana frequently travelled on business. In April, 1972, in the face of his and Barres' financial difficulties Veciana told Barres that he was in a position to put a kilogram of cocaine on Barres' desk in San Juan. He said the cocaine could easily be smuggled into the United States through the Government APO system because the packages were not checked by customs and that when he next returned from Bolivia he would bring back more information. Veciana then left for Bolivia and while he was gone, Barres asked Pomares if he knew a way to sell the cocaine. Pomares said he did and subsequently located buyers who agreed to pay $12,000 per kilogram. Thereafter, Veciana returned to San Juan and told Barres that he had made contact with a narcotics police chief in Bolivia and could obtain cocaine through him for $4,000 a kilogram: $2,000 for the manufacturer, $1,000 to the police chief for protection and $1,000 for the diplomat who would smuggle the cocaine through diplomatic channels to Veciana in the United States.

Veciana and Barres each put up $10,000 for the first purchase of five kilograms, and in late August, 1972, Veciana returned from Bolivia and told Barres that the five kilograms of cocaine had arrived with the diplomat in Miami.** A few days later Veciana delivered the cocaine to Barres and Pomares at a motel in Miami. Pomares weighed the cocaine and packed it into plastic bags of one kilogram each. Pomares then hid the cocaine in his hotel room and delivered it in stages to the buyers, described by Pomares

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* Reference to "Tr." are to pages of the trial transcript.

** Barres' bank check mailed to Veciana in Bolivia for $10,000 endorsed by Veciana to cover his share of the purchase price was introduced at trial (GX 1 and 2). References to GX are to Government's Exhibits at trial.

only as "The Midget" and an "old lady", whom Barres never met. Eventually Pomares received from the buyers the sale price of $12,000 per kilogram for each of the five kilos. Veciana, Barres and Pomares then divided the $40,000 profit on the sale with Veciana taking $3,000, and Barres and Pomares $2,500 on each kilo (Tr. 74-90, 94-110).

2. The Second Shipment of Ten Kilograms of Cocaine

In mid-October, 1973, after the proceeds had been received from the first shipment, Veciana told Barres that the diplomat was being transferred from Bolivia, but that he could transport ten kilograms to the United States on a ship with his furniture which was being stored here and that he would locate another diplomat to take his place for future shipments. Veciana also said the price per kilogram in Bolivia had been raised to $4,500, therefore Veciana and Barres each put up $22,500 to purchase the second shipment of ten kilograms. During these conversations also, the three men agreed that whenever they discussed the cocaine on the telephone they would use a code, referring to "documents being signed" or "papers being ready" when the cocaine was ready and referring to "acres" for kilograms.*

The second shipment did not arrive until the beginning of April, 1973 as the diplomat's furniture and the cocaine was delayed in Panama. After learning from Veciana that the second shipment had arrived, Pomares and Barres decided that they could not keep the ten kilos in a motel room and Pomares rented an apartment at the International Air-

* Also, to store the proceeds from the first shipment and in anticipation of profits from the second shipment, Pomares and Barres opened a safety deposit box at a bank in Miami. The record of this box was introduced by the Government at trial (GX 3).

port Italian Village next to the Miami Airport.* Pomares also located inside the apartment a kitchen cabinet wall which could be unscrewed making access to a hidden space which could be used to store the cocaine. Veciana then drove Barres to his house where Veciana had stored the ten kilograms after it had been received from the diplomat. They transferred the cocaine to Veciana's car and delivered it to Pomares who took it to the Italian Village apartment, weighed it, packaged it again in one kilogram packets and stored it and a new set of scales Pomares had obtained in the space behind the cabinet in the kitchen. Pomares then made deliveries of the cocaine to "The Midget". Thereafter according to Pomares, "the Midget" had great difficulty in selling the cocaine. By the end of the month, however, some money started coming in from the sale of the cocaine and Barres was able to deliver $13,000 in cash to Veciana in San Juan for Veciana to use to obtain the third shipment of cocaine. Veciana, however, lost the $13,000 when his rented car was stolen in San Juan with the money in it.** During this period, Pomares and Barres continued to make deposits of cash received from the proceeds of this sale in the safety deposit box they had rented in Miami.*** Finally Pomares received payment for all but 1½ of the ten kilograms (Tr. 111-142).

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* The lease for the apartment was introduced as GX 4.

** A Cuban associate of Veciana's, Enriquez Nunez, testified at trial and confirmed that Veciana had lost approximately $13,000 cash in a stolen car at the end of April. Nunez said that Veciana had attended with him a meeting of the anti-Castro, free-Cuba, movement in San Juan at that time and had shown him the $13,000 which Veciana had said he was donating to the movement (Tr. 429-434).

*** The record of access to the safety deposit box confirms these visits made in May, 1973 (GX 3).

3. The Third Shipment of Ten Kilograms of Cocaine

Because of the difficulties Pomares had selling the second shipment of cocaine through "The Midget", Barres and Pomares agreed to find a new buyer for the third shipment which Veciana had said would arrive with the new diplomat on approximately July 15, 1973. Barres remembered a man named Tony, whom he had met at a conference in New York in 1969 and who had been described to him then as a grandson of a captain in the Mafia. Barres in 1969 had spoken to Tony and had had a few brief dealings with him. One such dealing was that Tony had offered to sell Barres 200,000 birth control cases at such a low price that Barres had been convinced that the merchandise must have been stolen. In June, 1973, Barres decided that he would contact Tony about the third shipment of cocaine.

In June, 1973, Barres went to Tony's office in New York and offered to sell him the cocaine for $20,000 per kilogram. Tony told Barres that he was not in the business but that he had a "cousin" who was and he would check with him. Subsequently, Tony contacted Barres and arranged to introduce him to his "cousin". On June 29, 1973 Barres met the "cousin", who unknown to Barres turned out to be New York City Police Detective John Bruno, assigned to the New York Joint Narcotics Task Force. At their first meeting Detective Bruno agreed to purchase five kilograms of pure cocaine from Barres for $23,000 per kilogram. In the course of the meeting, Barres told Bruno that when they discussed the business of cocaine on the telephone they should use the code: "documents" for cocaine, "acres of land" for kilos.

Two weeks later on July 16, 1973 Barres met Detective Bruno at the Taft Hotel and delivered a sample of cocaine to him hidden in a small-Q-Tip box. The next night Barres and Bruno met again at dinner and Bruno said he could

buy two additional kilograms for a total of seven.* On July 18, 1973, Barres returned to the apartment at the Italian Village in Miami and met Veciana who told him that the cocaine had already arrived.** Barres called Pomares in San Juan and Pomares said he could not arrive in Miami until July 20th or 21st. Veciana said he would hold the cocaine until Pomares arrived. Barres in the meantime had purchased a train ticket for Pomares on Amtrak from Miami to New York for July 22nd so that Pomares could transport the cocaine to New York.***

Pomares arrived at the apartment in Miami on Saturday morning, July 21st. Barres and Pomares called Veciana, and Veciana drove to the apartment with the cocaine in the trunk of his car and joined Barres and Pomares in the apartment. In the apartment Veciana explained how

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* The conversations between Barres and Bruno were recorded on KEL transmitting and recording devices. These recordings were played to defense counsel. When the government sought to introduce them at trial defense counsel stipulated that they confirmed that Barres and Bruno's conversations had been as Barres and Bruno described them from the witness stand (Tr. 521-524).

** After Veciana received the cocaine but before he reached Barres, he telephoned Pomares at his office at Freca in San Juan and using the agreed upon code words advised him that the cocaine had arrived. When the call was made Pomares was not at the office and the phone was answered by Francisco Carpio, a Freco accountant. Carpio testified at trial that he had answered the telephone, that a man had asked for Mr. Pomares, and then, being advised that Pomares was not there, had said "Please tell him . . . my name is Veciana, I received the documents" (Tr. 404, 408). Carpio hung up, called Pomares and gave him the exact message, "Ariel (Pomares), I just received a call from a man named Veciana who asked me to tell you that he received the documents" (Tr. 406). According to Carpio, upon hearing the message, Pomares asked no further questions and said only "Thank you very much" (Tr. 398-406).

*** The Amtrak train copy of the ticket for July 22, 1973, with Pomares' name on it as the passenger, was introduced at trial (GX 16).

the new diplomat had smuggled the cocaine into the United States in plastic tubes. In the middle of the conversation, two business associates of Barres, Jose Ramon Lopez and Guillermo Figueroa, arrived unexpectedly at the apartment. As the two men entered, Veciana and Pomares, suddenly acting as if they had to leave, exited the apartment together. Lopez and Figueroa stayed talking to Barres for a short time and then both left themselves.** Barres then called Pomares, who returned to the apartment and told him that Veciana had transferred the cocaine from the trunk of his car to Pomares' car and had left. Barres and Pomares took the cocaine into the apartment from the trunk of Pomares' car, removed the scale from the hidden space behind the cabinet in the kitchen and proceeded to pack the cocaine into bags of one kilogram each. After completing the packaging they stored the scales and three kilograms in the hidden compartment in the kitchen. Pomares placed the seven kilograms of cocaine in a suitcase in preparation for taking the train to New York the next morning where he was to deliver the cocaine to Barres on July 23rd.

In New York, Barres reserved two rooms at the Taft Hotel, one room for himself in which to meet Bruno and the other to store the cocaine, and he made an appointment to meet Bruno for the sale on the 23rd. On July 23rd, Barres met Pomares at the Americana Hotel and gave him the key to the room at the Taft Hotel where the cocaine was to be held. In the meantime Detective Bruno and fellow agents prepared to arrest Barres in the hotel with the seven kilograms of cocaine. At approximately 1:00 P.M., Bruno met Barres at the Hotel Taft. Barres brought the cocaine into his room and opened the suit case with the seven kilos. Bruno gave a prearranged signal over his

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** Figueroa and Lopez both testified at the trial and confirmed that they had arrived unexpectedly at the apartment to speak with Barres on the morning of July 21st. Both confirmed that Veciana and Pomares had been in the apartment talking to Barres and that Veciana and Pomares had left together abruptly when they arrived (Tr. 373-397).

KEL transmitter and Task Force agents broke into the room, seized the cocaine and the suitcase (GX 9-A-9-I), and arrested Barres. Pomares after learning of the arrest returned by plane that same day to Miami (Tr. 142-206, 453-470).*

4. The Seizure of the Additional Three Kilograms of Cocaine in Miami and the Arrests of Veciana and Pomares

After his arrest, Barres agreed to cooperate with the Government and make a complete statement. Subsequently on July 24, 1974 acting on information provided by Barres, the agents obtained a search warrant for the Italian Village apartment in Miami where they found the scales and the three kilograms of cocaine in the hidden compartment behind the cabinet in the kitchen (GX D and 11).** On July 24, 1973 Veciana was arrested in Miami, and on July 29, 1973, acting on an arrest warrant from the Southern District of New York, agents including Detective Bruno, arrested Pomares at his home in Puesto Rico (Tr. 473-477). At his arrest at house Pomares was advised of his constitutional rights in Spanish by Special Agents Amador and Pinol. Pomares was then driven to the Drug Enforcement Administration (D.E.A.) office in San Juan and prior to being questioned at the office he was again advised of his rights in Spanish by Agent Pinol who on this occasion read the rights from his standard rights card (Tr. 473-477, 494-497, 511). At the office Pomares agreed to cooperate with the Government and Detective Bruno asked him questions with Agent Pinol serving as an English-

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*The records of the Hotel Taft were introduced as were certain hotel records of Pomares which confirmed that he spent the night of July 21st at the motel in Miami, the night of the 22nd at the Americana in New York and returned to another hotel in Miami on the night of the 23rd (GX 7, 14, 15).

**It was stipulated by defense counsel that a chemist if called would testify that traces of cocaine were found on the scales (Tr. 520).

Spanish interpreter. Pomares confession confirmed Barres' version of the details of the third shipment.

B. The Defendants' Case

Antonio Veciana's 17 year old daughter, Ana Veciana, was the only witness called by Veciana. She testified that she lived with her parents, brothers and sisters and grandparents in Miami. She said that on July 21, 1973 at 8:00 A.M. her father had dropped her and her sisters off at her cousin's house in Miami. She said she stayed there for two hours and at 10:00 A.M. her father picked them up. Next they drove to pick up her mother who was doing the weekly grocery shopping and returned home. They stayed home for 20 minutes and then her father drove her, her grandmother and a friend of her father's, to a post office at the airport. On the way to the post office they stopped at an apartment building and her father got out of the car and entered the building. While he was inside people were coming in and out. He left the apartment after 15 or 20 minutes, returned to the car, and drove her to the airport. Next they dropped her grandmother off at the grandmother's house, dropped her father's friend off at a bus stop about 10 minutes later and then at 1:00 P.M. she and her father returned home. At 2:00 P.M. she said her father, after showering and dressing, went to a convention for accountants. He returned at 6:00 P.M. and later her father took her to her cousin's party. She said she remembered this day so well because of the party.

On cross-examination, Ana Veciana was asked what she did on Saturday, July 28th. She said she stayed home all day and cleaned the house as she did every Saturday. She was asked what she did on Saturday, August 4th, and she said she started packing for a trip to Washington, D.C. with her uncle and aunt. When asked about Saturday, July 14th she said she wasn't sure whether she stayed home or went out.

Ariel Pomares presented no evidence.

ARGUMENT

POINT I

The Obtaining and Use at Trial of Pomares' Oral Confession Was Proper.

Appellants contend that there were a number of errors surrounding Judge Bonsal's handling of Pomares' oral confession. The contention is without merit.

A. The Government did not waive the right to use the oral confession

Appellants claim first that the Government at a pretrial conference three months before trial waived its right to introduce at trial the oral confession of Pomares made to Agent Pinol and Detective Bruno immediately after his arrest. The point is frivolous.

The evidence at trial showed that Pomares had in fact made two statements after his arrest and his agreement to cooperate, one oral statement and a later one committed by Agent Pinol to writing. As Judge Bonsal ruled, if the Government made any waiver it was made only with respect to the use of the written statement. Clearly there was no waiver or stipulation that the Government would not use the oral statement.

The issue of the two page written statement first arose at a conference on discovery and pretrial motions between defense counsel and counsel for the Government, Assistant United States Attorney Eugene Bannigan. At that time, Bannigan gave defense counsel for Pomares, pursuant to Rule 16(a) of the Federal Rules of Criminal Procedure, a copy of the two page written confession of Pomares prepared by Agent Pinol. On October 4, 1973 all counsel at-

tended a pretrial conference before Judge Bonsal to fix a trial date and resolve any outstanding pretrial motions. Counsel for Veciana mentioned the Pomares statement (obviously referring to the written statement because that was all either he or Bannigan knew about at the time) in connection with a possible Bruton problem and the prosecutor, Bannigan, said, "I can resolve that right now. We will not use the statement" (A. 16, 19-20).*

The issue of the written statement did not arise again until the week before trial in January. At that time Assistant United States Attorney Littlefield had replaced Assistant United States Attorney Bannigan as the prosecutor. Littlefield indicated to defense counsel that he intended to use Pomares' written statement but, to avoid the *Bruton* problem, would redact it to delete references to Veciana. The day of trial defense counsel brought the issue of the written statement to Judge Bonsal's attention. After reviewing the minutes of the pretrial conference Judge Bonsal determined that because of Bannigan's statement at the pretrial conference he would not permit the Government to use the written statement on the Government's case (Tr. 29-30).

Thereafter, the Government sought to introduce the oral confession of Pomares made prior to the written statement. Defense counsel objected on the ground that the Government had somehow waived the right to introduce

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* It is in fact unclear from the context exactly what Bannigan meant by this statement. He later explained that "(W)hat I meant was that because of the *Bruton* problem the statement would not be used against Mr. Veciana, and it would be redacted" (Tr. 29). In that the inquiry about the *Bruton* problem was made at the pretrial conference by counsel for Veciana, who was obviously the only one concerned about a *Bruton* problem, this interpretation is logical. In any event, it is plainly what Bannigan meant since he told Littlefield and the Court later that he had no intention of not using the statement against Pomares (Tr. 15, 16, 24, 29). References to "A. " are to pages in Appellant's Appendix.

testimony of the oral confession as well. Judge Bonsal stated that, "I don't construe their waiver to go that far" (Tr. 251), and noted that his ruling had only been with respect to excluding the written statement. However, in order to avoid a Bruton problem with the oral confession he permitted the Government to introduce through Agent Pinol only the latter portion of it which covered the events after Veciana had delivered the third shipment of cocaine to Pomares and departed from the scene (Tr. 207-11, 249-253, 450, 451, 491, 498-500).*

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* Judge Bonsal was clearly correct on the facts in ruling that the Government never waived the right to introduce the oral confession. However, even if the Government had said on the record at a pretrial conference something to the effect that "we will not use any admissions or confessions, oral or otherwise, by Pomares in this case," the Government would not necessarily be bound by the statement and could presumably change its mind, unless the defendant could show bad faith on the part of the Government or prejudice to the defendant as a result of his proceeding on the assumption that the confession would not be used (e.g. foregoing a motion to suppress). Appellants in their brief claim they were prejudiced because the confession was strong evidence. Obviously, however, that is not the kind of prejudice required. *United States* v. *Cirillo*, (Dkt. Nos. 676, 677, 684, 688, 730, 762, 763, 796 (2d Cir., May 7, 1974), *slip op.* at 3312-3315.

Appellants also argue that the oral confession and typewritten statement were essentially the same and therefore a waiver of one was a waiver of the other. Judge Bonsal did not agree with that argument and the testimony of Agent Pinol and Detective Bruno does not support it (Tr. 220-224, 233-234, 240-248, 450, 451, 497-500). In support of this argument appellants in their brief (p. 21) claim that the distinction between the written statement and the oral one was obviously spurious because "never in the history of the proceedings" before trial did the Government advise defense counsel about the oral statements. The facts are that the Government did not learn about them until Agent Pinol arrived from Puerto Rico during the trial and advised the prosecutor of the statements (Tr. 450, 451). In any event, no inference can be drawn from the Government's having failed to disclose the oral statement, because the Government is not obligated to disclose oral admissions as part of pretrial discovery. Rule 16, Fed. R. Crim. P.

B. Pomares' confession was voluntary

Appellants concede that after Pomares' arrest he was advised of his constitutional rights in Spanish three times prior to making his oral confession to Agent Pinol. In their brief, however, appellants by stringing together widely interspersed and cumulative questions and answers from both the suppression hearing and the trial (Brief p. 31-36) attempted to create the utterly false impression that Pomares' confession was the product of prolonged and overbearing psychological coercion. The contention is without merit. Pomares freely and voluntarily cooperated with the agents from the outset and Judge Bonsal found his confession wholly uncoerced (Tr. 444-451).

A confession is admissible if voluntarily made. "The test of voluntariness is whether an examination of all the circumstances discloses that the conduct of 'law enforcement officials was such as to overbear [the defendant's] will to resist and bring about confessions not freely self-determined. . . .' *Rogers* v. *Richmond,* 365 U.S. 534, 544 (1966)," *United States* v. *Ferrara,* 377 F.2d 16 (2d Cir.), *cert. denied,* 389 U.S. 908 (1967). Not even a minimum level of overbearing conduct was reached in this case.

After his arrest naturally the agents tried to persuade Pomares to cooperate and to confess. This Court has clearly said that there is no public policy against obtaining confessions, only that if one is obtained it must follow a knowing waiver of the right to silence. *United States* v. *Drummond,* 354 F.2d 132, 144 (2d Cir. En Banc 1965), *cert. denied,* 384 U.S. 1013 (1966).* It is plain from a reading of the testimony of Bruno and Pinol at the suppression hearing and a review of all the facts and circumstances

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* The agents had good reason to expect Pomares to cooperate because they knew he was a close associate of Barres, and Barres had quickly confessed and cooperated a week before when he had been arrested.

that Pomares knew exactly what he was doing and chose from the start to cooperate. *United States* v. *Drummond*, *supra*, 354 F.2d at 145-146, 148.**

** At the suppression hearing Bruno described the exchange he had had with Pomares in the car on the way to the D.E.A. office.

> "Q. What was being said generally? A. I asked him if he would like to cooperate.
>
> "Q. What did he say? A. He says yes, he would like to do anything to help himself.
>
> "Q. And what did he say through the interpreter and what did you ask him through the interpreter? A. Well, during the ride there I told him just to think about that anything that he can help us with would be helping himself" (Tr. 218).

At the suppression hearing Pinol described the same exchange, on direct examination;

> "Q. And during the ride, or at the time at the house did he indicate whether he wanted to cooperate or not? A. Yes, sir. He say he was willing to state what happened, what his role was in this problem that he was involved" (Tr. 231).

and on cross-examination;

> "Q. Why did you not make immediate arrangements to have this defendant arraigned, immediately after his arrest? A. Well, sir, I don't know if you know the procedure. We have to fingerprint him, we have to file a personal history. It takes time, sir; pictures, fingerprints, personal history.
>
> "Q. You also spent a lot of time questioning him, did you not, aside from fingerprints? A. Not too much time because he was willing, as I told you before, willing to testify, to make statements, sign the statement. Also he mentioned that he wanted to testify in Court."

The remarks to which appellants object are the following, described by Pinol in his testimony on cross-examination at the suppression hearing.

> "Q. Did anyone tell him in your presence that it would be advantageous to him to cooperate with the government? A. Oh, yes, sir.
>
> "Q. Who told him that? A. Mr. Bruno and I translated to him in Spanish.

(Footnote continued on next page)

First, it is undisputed that before Pomares made his confession he was advised of his rights properly in Spanish three times and that he indicated he understood them. The rights were given twice at his house after his arrest, once by Agent Amador translating for Detective Bruno and once by Agent Pinol reading off his constitutional rights card, and the third time at the D.E.A. office by Agent Pinol again reading from his rights card (Tr. 215, 219, 227, 230, 245, 246 [From the suppression hearing]; and Tr. 479, 480, 494, 496, 497, 511 [From trial testimony]).*

Second, Pomares was not exposed to protracted interrogation. The time between arrest and confession, and the arraignment was short. Pomares was arrested at his home on a Sunday at approximately 12:15 p.m., returned to the D.E.A. office by 1:30 (at which time the United States Attorney was notified), and arraigned before the Chief Judge for the District of Puerto Rico at the Chief Judge's home between 4:00 and 5:00 the same day (Tr. 227, 232,

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"Q. Can you tell me what was said? A. Mr. Bruno told him in English that the best lawyer he can ever have was his own person if he cooperated with the government.

"Q. The best lawyer he could ever have was his own self? A. Yes.

"Q. And cooperate with the government? A. That's correct" (Tr. 421).

At trial the agents were subjected to additional cross-examination on this subject. That testimony was entirely consistent with the testimony given at the suppression hearing. Whatever minor discrepancies may have existed were clearly insufficient to invalidate in any way Judge Bonsal's finding at the close of the suppression hearing that Pomares' confession was voluntary.

* At the house Pomares also had translated for him and had signed a consent search (SHE 1, GX 18). He later signed a Spanish consent search form after being returned to the office. This form stated that he had been advised of his constitutional rights and that the permission was given voluntarily without any threats or promises by the agent (SHE 2, GX 18). References to "SHE" are to Exhibits from the Suppression Hearing.

244). *United States* v. *Drummond*, 354 F.2d 145 (2d Cir. 1965).*

Third, Pomares is an intelligent, experienced businessman, aged 37 years, mentally capable of understanding his rights and of waiving his right to remain silent.** Moreover, he was fully aware of his situation having been advised that he had been arrested on a warrant for violation of the Federal Narcotics Laws (Tr. 238). In addition, his statement itself was lucid and contained many details, indicative of his clear thinking at the time.***

Fourth, Bruno made no specific promises to Pomares, only general comments that it would be to his advantage to cooperate. What he told him in fact was the truth, essentially that it would help him to cooperate. *United States* v. *Williams*, 479 F.2d 1138 (4th Cir. 1973); *United States* v. *Glascow*, 451 F.2d 557 (9th Cir. 1971).* Such general efforts at persuasion are plainly less coercive than a promise of a specific benefit if the defendant confesses. Yet a promise that a defendant would get out on bail if he confessed was held by the Second Circuit not to render the ensuing statement involuntary in *United States* v. *Ferrara*, *supra*. Similarly a promise that the defendant would receive a lesser sentence was not held to render a confession

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* Compare this speedy arraignment with for example the Southern District of New York, where a person arrested on Sunday is not arraigned until Monday morning.

** Compare Gallegos v. Colorado, 370 U.S. 49 (1962) and Reck v. Pate, 367 U.S. 433 (1961).

*** It is unlikely that Pomares was caught entirely by surprise by the arrest. It took place six days after Pomares had learned that Barres had been arrested, four days after the three kilograms and the scales had been seized from the apartment rented to Pomares in Miami, and three days after Veciana had been arrested.

* In *Glascow*, a statement that men who cooperated in the past "have received a break" did not render the confession involuntary.

involuntary in *United States* v. *Bailey*, 468 F.2d 652, 672-674 (5th Cir. 1972). See also *United States* v. *Springer*, 460 F.2d 1344 (7th Cir. 1972); *United States* v. *Frazier*, 434 F.2d 994 (5th Cir. 1970); *United States* v. *Anderson*, 394 F.2d 743 (2d Cir. 1968).**

Fifth, Bruno clearly made no threats to Pomares, except to tell Pomares the truth, that they had a tight case against him on which he could get 15 years.

Finally, Pomares was never called to the stand at the suppression hearing so we have no testimony from him that he felt coerced or terrified into confessing, nor do we

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** The facts of *People* v. *Russell*, 259 C.A. 2d 637, 66 Cal. Rptr. 594 (1968) cited by appellant are distinguishable from the facts here. In *Russell*, the defendant, a young man, was interrogated by one officer in a solitary detention cell of a police station shortly after 2:00 A.M. in the morning. The defendant was advised of his rights in the solitary room and then immediately told that "it might be better if he talked." The court found that under these circumstances the Miranda warnings were ineffective. The Court implied that it was the circumstances of everything occurring in the solitary room that made the procedure objectionable and noted that if the warnings had been given properly at the scene of the arrest the Court might have found them satisfactory.

In any event, California cases before and after *Russell* make clear that the *Russell* finding is the exception not the rule. In *People* v. *Hill*, 66 Cal. 2d 536, 426 P. 2d 908, 57 Cal. Rptr. 340, *cert. denied*, 389 U.S. 993 (1967), also cited in appellants brief and preceding *Russell*, the defendant had been told he should confess "to grab a life saver," and to "help himself." The Court used the exact language later found objectionable in *Russell* and held advice *"that it would be better to tell the truth* unaccompanied by either a threat or a promise does not render a subsequent confession involuntary." *People* v. *Hill*, *supra*, 58 Cal. Rptr. at 348. See also *People* v. *Ditson*, 57 Cal. 2d 415, 369 P. 2d 714, 20 Cal. Rptr. 165 (1962). Subsequent cases following *Hill* and not *Russell*, include *People* v. *Carter*, 7 C.A. 3d 336, 88 Cal. Rptr. 546 (1970) (exhortations to tell the truth not deemed coercive), and *People* v. *Hurlic*, 14 C.A. 3d 132, 92 Cal. Rptr. 55, fn. 14 (1971).

have any version of the confession other than the one testified to by Bruno and Pinol. Although the burden is on the Government to prove that the waiver was knowing and that the confession was voluntary, absent a convincing presentation from Pomares that he was coerced, on this record and all the circumstances Judge Bonsal was clearly correct in finding that he had not been.*

C. The testimony that Pomares or his lawyer had said he wanted immunity was harmless

Pomares advances as his next point that there was improper comment on his exercise of his Fifth Amendment privilege against self-incrimination by virtue of the following testimony of Agent Pinol:

> "Q. (After Pomares had agreed to cooperate and come back the next day, but had not come back) Did you contact him to see if he still wanted to cooperate? A. I talked to his lawyer and I talked to him and he promised to come back but he wanted immunity" (Tr. 501).

The error, if any, was harmless.

The jury had already heard the testimony about Pomares' confession and agreement to cooperate so they knew something had happened by which that agreement had not come to pass. If the jury caught the passing, one word reference to immunity, which is unlikely, it nevertheless did no more damage to Pomares than already existed with Agent Pinol's entirely proper testimony about Pomares' confession and agreement to cooperate. *Haberstroh* v. *Montanye,* 493 F.2d 483, 485 (2d Cir. 1974).

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* See also *United States* v. *Vigo,* 487 F.2d 295 (2d Cir. 1973).

D. Judge Bonsal's charge to the jury on Pomares' statement was proper

Appellants next argue that it was error for Judge Bonsal not to have told the jury specifically that they could disregard Pomares' confession altogether. Appellants cite no authority for this point and the point is without merit.*

Judge Bonsal adequately advised the jury that

> "Then, you recall ladies and gentlemen, that Agent Pinol, testified that Mr. Pomares made certain statements to him in San Juan following his arrest. I think this was discussed in considerable detail by Mr. Boitel (counsel for Pomares) and also the government this morning (in summations). * * *
>
> "In considering these statements ladies and gentlemen, give them such weight as you think they deserve under all the circumstances which have been brought out in the evidence in the case" (Tr. 676).

Judge Bonsal further instructed the jury at length on the credibility of witnesses, pointing out that if the jury found that a witness had been discredited or testified falsely the jury could reject all his testimony (Tr. 677-680). He also clearly advised the jury that they alone decided the facts in the case (Tr. 656). In short, the jury was fairly instructed under all the circumstances on how to treat Pomares' alleged confession.

On this point it is relevant also that counsel for Pomares was permitted to cross-examine Agents Pinol and Detective Bruno at length on the circumstances of Pomares confession, as the Supreme Court noted was proper in the quotation cited in appellants' brief from *Lego* v. *Twomey, supra.* Counsel for Pomares argued forcefully in summa-

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* The only case cited in *Lego* v. *Twomey*, 404 U.S. 477 (1972) which does not deal with a judge's charge.

tion, and the jury undoubtedly understood his point, that because of the circumstances of the making of the alleged confession, i.e. the pressure Pomares was under having been arrested, the fact that Bruno (through Pinol) apparently asked leading questions of Pomares, the fact that there was no tape recording of the confession, and the fact that Pinol's original notes had been destroyed, they could, and should, ignore the confession entirely.*

E. Veciana was not entitled to a severance because of the admission of Pomares' confession

Veciana next claims that under *Bruton* v. *United States*, 391 U.S. 123 (1968) he was entitled to a severance when the court ruled that Pomares' oral confession could be admitted. The point is meritless because Judge Bonsal protected Veciana from vicarious incrimination from the confession to a much greater extent than the Second Circuit cases required him to have done under the circumstances.

Pomares' confession covered all the facts surrounding the third shipment of ten kilos of cocaine, implicating Veciana as the man who had delivered the ten kilos of cocaine to Pomares from the trunk of his car the morning of July 21st, and mentioning that Veciana had been with Pomares and Barres in the Italian Village apartment prior to the delivery of the cocaine when the unexpected visitors, Lopez and Figueroa, had arrived. Judge Bonsal, however, required the government to start Pinol's testimony to the jury concerning the statement from the point after the delivery of cocaine had been made when Veciana had al-

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* During this argument, counsel for Pomares also suggested that the Government was at fault for not having made a written transcript of the confession. This was obviously an unfair argument since counsel well knew that just such a transcript had been made but had been excluded by Judge Bonsal on the dubious theory that the Government had waived its right to use it on its direct case (Tr. 601-602).

ready departed from the scene and was no longer involved. In short, the jury heard no mention of Veciana or of the events in which Barres had said Veciana was involved. Far from hurting Veciana, this excessive and unnecessary truncation of Pomares confession should have helped him because it gave the impression to the jury that Pomares who the government urged at the time of his confession was telling the truth, had not implicated Veciana.

In any event there was no error in not granting Veciana a severance. All he was entitled to in connection with the confession was to have his name excluded. Under *United States* v. *Trudo*, 449 F.2d 649 (2d Cir.), *cert. denied*, 405 U.S. 926 (1971) and *United States ex rel. Nelson v. Follette*, 430 F.2d 1055 (2d Cir. 1970), it would have been proper for Judge Bonsal to have admitted the confession, including the description of the events with Veciana as long as on its face, without regard to the other testimony in the case, the confession did not implicate Veciana.*

Furthermore prior to trial and before Judge Bonsal's ruling on Pomares' oral confession, the government had requested a severance of the two so that it could try and convict Pomares alone first and then call him as a witness against Veciana under a grant of immunity. At that time counsel for Veciana strongly opposed the request (Tr. 27-28).

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* On this point it is also relevant that Judge Bonsal specifically charged the jury that they could consider Pomares' "statements only with respect to Pomares. You will not consider them with respect to the defendant Veciana" (Tr. 676).

POINT II

The Prosecutor's Summation Did Not Deny Defendants a Fair Trial.

Appellants next allege that three improprieties in the prosecutors summation require a new trial. The argument should be rejected.

A. Knowledge of the Bolivian connection

Appellants allege that their privileges against self-incrimination were infringed by the prosecutor's reference in summation to the evidence that Veciana was the sole person with knowledge of the undisclosed and uninterrupted source of cocaine from Bolivia. At the time of the comment, Veciana's counsel objected to what it characterized as a reference to the cooperation or lack of cooperation of a defendant on trial. The objection was sustained and the jury instructed to disregard the comment. Thereafter the prosecutor referred only to the cooperation of the witness Barres.

The Government contends that the prosecutor's challenged comments, while inadvisable, did not constitute any implied comment on the defendant's Fifth Amendment privilege. No suggestion was made that Veciana had failed to rebut the testimony of Barres or that Veciana had failed to explain ambiguous behavior and thus should have an adverse inference drawn against him. The comment with respect to Veciana's undisclosed knowledge of the Bolivian connection was prejudicial to Veciana only if the jury already believed the testimony of Barres that Veciana's role in the conspiracy was to secure the cocaine in Bolivia. If that testimony was believed, the principal adverse inference to Veciana flowed not from a failure to testify or cooperate but from his participation in an extremely serious crime. The danger in the prosecutor's comment was that

it also alluded to future inchoate crimes involving cocaine which might stem from the same undisclosed source of supply which were not the subject of the instant trial. Thus the trial court properly instructed the jury to disregard the prosecutor's comment. *Haberstroh* v. *Montanye, supra,* 493 at 485; *United States ex rel. Satz* v. *Mancusi,* 414 F.2d 90, 91, n. 1 (2d Cir. 1969); *United States* v. *Nasta,* 398 F.2d 283, 285 (2d Cir. 1968).

The further remark concerning the witness Barres' cooperation, unobjected to at the time, did not contain impermissible allusions to the defendnat's Fifth Amendment privilege either. Appellants' defense had consisted of non-stop attacks on the integrity of Barres. The accusations against him in summation and questioning went so far afield as to accuse him of being a pro-Castroite (Tr. 610)* and a cocaine user (Tr. 611), to blame him with no supporting evidence for perpetrating a series of swindles and crimes in connection with his business career (Tr. 281-288), and to suggest that he once required hospitalization for psychiatric problems (Tr. 289-290). In the face of these attacks the prosecutor pointed out that perhaps there was some good in Barres because he had cooperated with the authorities.

B. The alleged distortion of the witness Lopez' testimony

Appellants' next argument is that the prosecutor distorted the significance of the witness Lopez' testimony and in so doing violated Pomares' right to confront Veciana as an implicit witness against him within the meaning of *Bruton* v. *United States, supra.* The point is without merit.

Jose Ramon Lopez was originally called by the prosecution to testify that he had been one of the men who had un-

* In fact, the testimony was clear from all the witnesses that Barres had left Cuba because he opposed Castro and that Barres was very active with Veciana in the anti-Castro, free Cuba movement.

expectedly visited Barres in the Italian Village apartment on the morning that Veciana and Pomares had been in the apartment with Barres discussing the arrival of the third shipment of cocaine. Lopez testified with respect to this visit that when he entered the apartment, Veciana and Pomares, both of whom he knew, got up and left suddenly, together, without making any conversation with Lopez. Subsequently Lopez was recalled and testified to the extraordinarily damaging fact against Veciana, that a few days before the trial Veciana had approched Lopez in Florida and asked him to testify at the trial that Veciana and Pomares had left the apartment separately. Lopez stated that in this conversation Veciana had asked him to testify that,

> "A. * * * There had been some span of time, a little span of time between the time that Mr. Pomares left and until he left, but I told him that he left just right after Mr. Pomares left.
>
> "Q. Did he tell you to say how much of a span of time there was? A. He asked me to say that those were a few minutes, but as far as I know he left right away as soon as he finished saying what he was saying.
>
> "Q. He asked you to say that the two of them had left separately; is that right? A. Yes. He asked me to say that there was some time between both of them left (sic). There was some, but very, very little. It was very fast.
>
> "Q. What did you tell him? A. I told him that I would say just the truth" (Tr. 410-411).

The fact that apparently Veciana also told Lopez that "of course he should tell the truth" does not make the testimony any the less damaging.

Obviously what Veciana was doing was to try to influence Lopez to testify that Veciana and Pomares had left separately, because if they had done so, Barres' anticipated testimony that they left together and that Veciana had then transferred the cocaine to Pomares would have been contradicted. To comment in summation that this was powerful evidence of Veciana's guilt was clearly proper. Attempts by a defendant to influence the testimony of witnesses have long been held to indicate consciousness of guilt. *United States* v. *Freundlich*, 95 F.2d 376, 378, 379 (2d Cir. 1938); accord *United States* v. *Culotta*, 413 F.2d 1343 (2d Cir. 1969), *cert. denied*, 396 U.S. 1019 (1970). That Veciana's attempt to induce testimony from Lopez disassociating Veciana from Pomares might create an adverse inference against Pomares does not make the testimony of Lopez violative of *Bruton*. Veciana's conversation with Lopez was "not clearly inculpatory of Pomares because (it) alone did not serve to connect (him) with the crime. . . ." *United States ex rel. Nelson* v. *Follette*, *supra*, 430 F.2d at 1058; *United States* v. *Trudo*, *supra*, 449 F.2d at 652-53.

C. The alleged "placing new facts before the jury" impropriety

Next, appellants argue that the prosecutor became himself an unsworn witness because allegedly he commented in summation on the contents of Barres' confession to the agents after his arrest even though the statement had not been offered in evidence. In their brief appellants cite five instances where supposedly the prosecutor became an unsworn witness on this subject. The point is without merit. Most references in the summation to Barres' cooperation were to the general fact that he had confessed, a fact of which the jury was well aware, and not to details of his confession. Any specific references to details of the confession were to facts already in evidence.

On the general fact of the confession, Barres, on direct examination, testified that after his arrest he had made a complete confession (Tr. 260-261). He testified further on the same subject of "his statement (after his arrest) about the facts of this case" (Tr. 299-300), on cross-examination by counsel for Veciana and on cross-examination by counsel for Pomares, Barres agreed that immediately after his arrest he had "admitted his guilt in all these things" (referring to all the three transactions which he had described in his testimony to that point) (Tr. 333). Detective Bruno also testified that after Barres' arrest "he (Barres) had talked and said everything" (Tr. 473). So the fact of the confession was clearly in evidence.

On specific details of the confession, for example, the jury had already heard that immediately after his arrest Barres had confessed to the additional three kilograms and scales in the hidden compartment in the Florida apartment (which on the basis of his confession the agents had gone and found) (Tr. 292, 473-475) and the jury knew it was on the basis of Barres' statement that the agents had arrested Veciana and Pomares within a week of Barres' arrest (Tr. 473-475).*

Additional testimony about the contents of Barres' statement after his arrest was adduced by Pomares' attorney on cross-examination of Agent Pinol (Tr. 514-516). These questions concerned whether Bruno, during his interrogation of Pomares which led to Pomares' confession, had had Barres' statement with him and had asked leading questions to Pomares from it. This line of questioning was designed to make the jury believe that Bruno had essentially put the words of the confession into Pomares' mouth. In summa-

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* Despite appellants' allegation, there is no statement in the summation to the effect that Barres necessarily told the agents about the two earlier shipments immediately upon his arrest (although he had done so and it was reasonable from the evidence for the jury to assume that he had.)

tion Pomares' counsel made this argument even more strongly, that Bruno knew the whole story from Barres before he questioned Pomares and therefore the statement was not Pomares confessing but Bruno reciting the facts of Barres' confession (Tr. 600-601).

Finally, the references in the summation to the fact that Barres' testimony at trial was corroborated by documents which the Government had located and introduced as evidence, and by the testimony of the four individual witnesses, Lopez, Figueroa, Nunez and Carpio, were obviously fair comment. Barres' credibility was clearly bolstered, as the prosecutor observed, by the existence of the corroborating documents and of the testimony of the four witnesses who, even at the time of trial, Barres did not necessarily know the government had located and would produce.

POINT III

The Government Did Not Expand the Scope of the Indictment.

Appellants' final contention, that Judge Bonsal erred in permitting the government to introduce testimony at the trial concerning the first two shipments of cocaine is without merit. In support of the argument appellants cite language from *United States* v. *Byrd,* 352 F.2d 570 (2d Cir. 1965) which dealt with the admissibility of prior similar acts to prove intent, a wholly different situation than here. In the present case it was entirely in connection with the conspiracy charge that evidence of the prior shipments was introduced. In *Byrd,* in contrast, there was no conspiracy charge.

The indictment in this case charged a conspiracy from "on or about November 1, 1972 to the filing of the indictment." In connection with this charge the government introduced testimony by Barres concerning the background

and development of the conspiracy which included the financial problems which led the defendants into the conspiracy in the first place and their first five kilogram experimental shipment. The money to purchase the second shipment was not given to Veciana by Barres until mid-October, 1972 (Tr. 118-119) and the shipment did not arrive until April, 1973 (Tr. 127-128) so it can hardly be claimed that the second shipment fell outside the dates of the conspiracy charged.

Introduction of this evidence was entirely proper since it is well established that acts and conversations which antedate the conspiracy charged in the indictment are admissible if they show the beginning of the defendants' involvement in the criminal enterprise and are probative of the conspiracy charged. *United States* v. *Cioffi,* Dkt. No. 73-2612 (2d Cir. March 14, 1974) slip op. at 2232; *United States* v. *Cohen,* 489 F.2d 945, 949 (2d Cir. 1973); *United States* v. *Del Purgatorio,* 411 F.2d 84, 86-87 (2d Cir. 1969); *United States* v. *Castello,* 352 F.2d 848, 854 (2d Cir.), cert. granted on another issue, 383 U.S. 942 (1965).*

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* Appellants further argue that since the earlier shipments were not charged as substantive counts in the indictment no testimony about them should have been allowed. This is frivolous. It was obviously not possible for the government to charge defendants with the substantive distribution of the five kilograms from the first shipment or the ten kilograms from the second shipment because nothing in connection with either of those shipments took place in the Southern District of New York.

Appellants additionally point out that a superseding indictment was filed on January 4, 1973 four days before trial. The only changes, however, between the original and the superseding indictments were the addition of two overt acts and of Veciana as a co-defendant of Pomares in the substantive count. There was no surprise or prejudice in either of these changes since the two overt acts had been specified in the government's bill of particulars filed and served on defendants on November 8, 1973, three months before trial,. and Veciana already knew that his implication in the conspiracy was based largely on his role in the smuggling and distribution of the seven kilograms which were the subject of the substantive count.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

Bancroft Littlefield, Jr. being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 6th day of June, 1974 he served 2 copies of the within brief by placing the same in a properly postpaid franked envelope addressed:

Henry J. Boitel, Esq.
233 Broadway
New York, NY 10007

And deponent further says that he sealed the said envelope and placed the same in the mail drop for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

Bancroft Littlefield

Sworn to before me this

6th day of June 1974

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Certificate filed in New York County
Commission Expires March 30, 1975